PD-1213-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/12/2021 3:08 PM
Accepted 4/13/2021 2:35 PM
DEANA WILLIAMSON
CLERK

ORAL ARGUMENT REQUESTED

CAUSE NO. PD-1213-20

FILED
COURT OF CRIMINAL APPEALS
4/13/2021
DEANA WILLIAMSON, CLERK

IN THE

TEXAS COURT OF CRIMINAL APPEALS AT AUSTIN

THE STATE OF TEXAS, Petitioner,

VS.

BOBBY CARL LENNOX A/K/A BOBBY CARL LEANOX, Respondent.

ON PETITION FOR REVIEW FROM THE SIXTH JUDICIAL DISTRICT COURT OF APPEALS AT TEXARKANA; CAUSE NO. 06-19-00164-CR; FROM THE SIXTH JUDICIAL DISTRICT COURT OF LAMAR COUNTY; TRIAL CAUSE NO. 28256; HONORABLE R. WESLEY TIDWELL, JUDGE

THE STATE OF TEXAS' BRIEF ON THE MERITS

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ATTORNEYS FOR THE STATE OF TEXAS

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a), a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel is required:

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STATEMENT OF THE CASE

This forgery case involved the statutory construction of the 2017 amendments to the Penal Code. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 977, § 25, 2017 Tex. Gen. Laws 3966, 3977 (current version at TEX. PENAL CODE ANN. § 32.21).

In February of 2019, a grand jury in Lamar County returned a three-count indictment (CR, pgs. 6-8) that charged Bobby Carl Lennox (Lennox) with the state-jail felony offense of forgery of a financial instrument(s). After a jury trial, the jury, by its verdicts, found Lennox guilty of the offense of forgery of a financial instrument(s), as charged in the indictment. *See* RR, Vol. 3, pgs. 146-147; CR, pgs. 66-68. That jury also found the enhancement paragraphs in the indictment (CR, pg. 8) to be "true" in each count and assessed Lennox's punishment at seventeen (17) years in the TDCJ-ID. *See* RR, Vol. 3, pgs. 232-234; CR, pgs. 78, 80, 82.

From the trial court's final judgment(s) (CR, pgs. 91-92; 94-95; 97-98), Lennox timely filed his notice of appeal. *See* CR, pg. 86. On original submission, the court of appeals reversed the trial court's judgment, but later granted the State's motion for rehearing. On rehearing, the court of appeals reversed and reformed the trial court's judgment "to reflect that he was convicted of three class B misdemeanor offenses . . ." *Lennox v. State*, 613 S.W.3d 597, 600, 606-07 (Tex. App.—Texarkana 2020, n.p.h). On December 18, 2020, the State filed its petition for review.

On February 24, 2021, this Court granted the State's petition for review.

STATEMENT REGARDING ORAL ARGUMENT

In granting the State's petition for review, this Court granted oral argument. The State requests oral argument.

ISSUE(S)/GROUND(S) PRESENTED

SOLE GROUND PRESENTED: FROM THE APPELLATE COURT'S STATUTORY CONSTRUCTION OF SECTION 32.21(e-1) OF THE TEXAS PENAL CODE, THERE WAS NO JURY CHARGE ERROR; BUT IN RESOLVING THE JURISDICTIONAL CONFLICT HEREIN, THE STATE OF TEXAS CORRECTLY CHARGES THE FELONY OFFENSE OF FORGERY UNDER SECTION 32.21 OF THE PENAL CODE, WHEN THE INDICTMENT ALLEGES THAT ANY DEFENDANT FORGES A WRITING WITH THE INTENT TO HARM OR DEFRAUD ANOTHER; THE WRITING IS THE ESSENTIAL ELEMENT OF THE OFFENSE, AND THE VALUE LADDER IN SUBSECTION (E-1), AS AMENDED IN 2017, WAS NOT AN ELEMENT OF THE OFFENSE, BUT A PUNISHMENT ISSUE.

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THE STATE OF TEXAS' BRIEF ON THE MERITS

TO THE HONORABLE TEXAS COURT OF CRIMNAL APPEALS:

COMES NOW, the State of Texas ("the State"), by and through the elected county and district attorney of Lamar County, Gary D. Young, and the Lamar County and District Attorney's Office, and Jeffrey W. Shell, an *attorney pro tem*, respectfully submits this Brief on the Merits under Rule 70.3, along with Rules 9 and 38, of the Texas Rules of Appellate Procedure.

STATEMENT OF FACTS

Factual Background.

In January of 2019, Nima Sherpa (Nima) was working as the manager of the *Quick Track* gas station in Paris, and he knew Lennox as a "regular customer."[1] *See* RR, Vol. 3, pgs. 56-57; *see also Lennox*, 613 S.W.3d at 600. Nima also knew Lennox from the store in Deport, Texas. *See* RR, Vol. 3, pg. 57; *see also* RR, Vol. 3, pg. 65 ("There are two stores. One is in Deport and one is in Paris on Lamar and Collegiate.").

According to Nima, Lennox came in "the Lamar store" and passed "two or three" checks. *See* RR, Vol. 3, pg. 58; State's Exhibit 1; *Lennox*, 613 S.W.3d at 600. The checks were cashed on January 7th, January 9th (RR, Vol. 3, pg. 59) and on January 12, 2019. *See* RR, Vol. 3, pg. 60; *Lennox*, 613 S.W.3d at 600.

The checks were written out of an account in the name of James Maurice McKnight (McKnight).[2] *See* RR, Vol. 3, pg. 39; State's Exhibit 1; *Lennox*, 613 S.W.3d at 600. "This debited the account [on] January 9th, 2019." *See* RR, Vol. 3, pg. 39. The other dates for the debits were January 14th and January 15, 2019. *See*

[1] At the time of Lennox's jury trial, Nima identified Lennox as the defendant in open court. *See* RR, Vol. 3, pg. 57.

[2] However, McKnight had passed away on May 11, 2018. See RR, Vol. 3, pg. 72. In June of 2018, Fran King (King), a resident of Lamar County and the daughter of McKnight, had closed the checking account with Guaranty Bank in Lamar County on June 6, 2018. See RR, Vol. 3, pgs. 34, 38, 73; State's Exhibit 1.

RR, Vol. 3, pg. 39. The three (3) checks were made out to "Bobby Lennox." *See* RR, Vol. 3, pg. 40. King did not write the checks, nor did her father (McKnight). *See* RR, Vol. 3, pgs. 73-74; *Lennox*, 613 S.W.3d at 601. King did not know "Bobby Lennox" and did not know of any work by Lennox for her father. *See* RR, Vol. 3, pg. 74; *Lennox*, 613 S.W.3d at 601. King said she reported the incident to law enforcement. *See Lennox*, 613 S.W.3d at 601.

"[I]t took a week or something" (RR, Vol. 3, pg. 63), but the checks were from the bank. *See* RR, Vol. 3, pgs. 67-68. Gyalbu Sherpa (Gyalbu), who also worked at *Quick Track*, was the manager of the two stores and knew Lennox.[3] *See* RR, Vol. 3, pgs. 65-66; *Lennox*, 613 S.W.3d at 600. After a few days (RR, Vol. 3, pg. 68), Gyalbu asked Lennox, "I said your checks are bad, why do you pass those checks?" *See Lennox*, 613 S.W.3d at 600. Lennox responded that "[he] worked for somebody and those [were the employer's] checks." *See id*. According to Gyalbu, Lennox claimed not to have known that the checks were "bad." *See Lennox*, 613 S.W.3d at 601.

In January of 2019 (RR, Vol. 3, pg. 42), James Cole Sain, a certified peace officer and a lieutenant in the Criminal Investigation Division (CID) with the Lamar County Sheriff's Office (Lieutenant Sain), began a criminal investigation involving

[3] At the time of the jury trial, Gyalbu Sherpa identified Lennox as the defendant in open court. See RR, Vol. 3, pgs. 66-67.

Lennox. *See* RR, Vol. 3, pgs. 41-42. Lieutenant Sain began his investigation on January 18th into forgery of a financial instrument. *See* RR, Vol. 3, pgs. 42-43. On January 22nd, Lieutenant Sain executed a search warrant at Lennox's resident in Deport. *See* RR, Vol. 3, pg. 45. However, the officers found nothing in reference to the forgery of a financial instrument. *See* RR, Vol. 3, pg. 47.

After the police executed the search warrant, Lennox and Brandon Crawford (Crawford), who lived in Detroit and "worked together a couple of times" (RR, Vol. 3, pg. 92), had a conversation as to why the warrant was issued. *See* RR, Vol. 3, pg. 94. According to Crawford, Lennox did tell Crawford during their conversation that he had received some checks. *See* RR, Vol. 3, pgs. 95; *see also* RR, Vol. 3, pgs. 96-97. Lennox also told Crawford that the checks came from the McKnight estate sale, and that he did pass the checks. *See* RR, Vol. 3, pgs. 95, 97.

Procedural Background: Three-Count Indictment and Jury Trial.

On February 14, 2019 (CR, pg. 6), a grand jury in Lamar County returned a three-count indictment that charged Lennox with the state-jail felony offense of forgery of a financial instrument, habitual offender. *See* CR, pgs. 6-8. At the time of Lennox's arraignment on March 18th (CR, pg. 9), the trial court signed an order that appointed defense counsel (CR, pg. 11) but, at no time thereafter prior to his jury trial, did Lennox move the trial court to quash the State's indictment.

In due course, the trial court proceeded with a jury trial on July 17, 2019. *See* RR, Vol. 2, pg. 1. At the conclusion of the voir dire proceedings (CR, pgs. 50-51), the trial court lawfully impaneled a petit jury. *See* RR, Vol. 2, pgs. 177-178; CR, pg. 52.

At the conclusion of the guilt-innocence phase, the jury retired to begin its deliberations. *See* RR, Vol. 3, pg. 141. At the conclusion of its deliberations, the jury reached its verdicts. *See* RR, Vol. 3, pg. 145; CR, pg. 59. By its verdicts, the jury found Lennox guilty of the offense of forgery of a financial instrument, as charged in counts 1, 2 and 3 of the indictment. *See* RR, Vol. 3, pgs. 146-147; CR, pgs. 66-68.

At the conclusion of its deliberations in the punishment phase, the jury reached its verdicts. *See* RR, Vol. 3, pg. 231; CR, pg. 71. By its verdicts, the jury found the enhancement paragraphs to be "true" in each count and assessed Lennox's punishment at seventeen (17) years in the Texas Department of Criminal Justice, Institutional Division. *See* RR, Vol. 3, pgs. 232-234; CR, pgs. 78, 80, 82. The trial judge then sentenced Lennox to a term of confinement for seventeen (17) years with the sentences to run concurrently. *See* RR, Vol. 3, pg. 238.

On July 18, 2019, the trial court signed its certification of the defendant's right of appeal (CR, pg. 84), and Lennox filed his notice of appeal. *See* CR, pg. 86. On

July 26th, the trial court signed its final judgments of conviction as to each count. *See* CR, pgs. 91-92 (count one); pgs. 94-95 (count two); pgs. 97-98 (count three).

Proceedings in the Court of Appeals.

On or about July 30, 2019, Lennox filed his notice of appeal in the Sixth Judicial District Court of Appeals at Texarkana. The district clerk filed the clerk's record on or about November 6, 2019. On or about November 25th, the official court reporter filed the reporter's record.

After the appellant and the State filed their respective briefs, the court of appeals set the case for submission without oral argument on January 14, 2020. On February 20th, the court of appeals issued its original opinion. *See Lennox v. State*, No. 06-19-00164-CR, 2020 Tex. App. LEXIS 1372, 2020 WL 830842 (Tex. App.—Texarkana, Feb. 20, 2020, n.p.h.) (designated for publication).

After the court of appeals granted a requested extension of time, the State filed its motion for rehearing on March 9, 2020. By its April 24th order, the court of appeals granted the State's motion for rehearing and withdrew its original opinion and judgment. *See Lennox v. State*, 06-19-00164-CR, 2020 Tex. App. LEXIS 8931, 2020 WL 6751487 (Tex. App.—Texarkana, Apr. 24, 2020). By its order, the court of appeals granted oral argument in *Lennox* and in *State v. Green*, No. 06-20-00010-CR, which presented the "same statutory interpretation issue."

After oral argument on August 12th, the court of appeals issued in opinions on November 23, 2020. *See Green v. State*, 613 S.W.3d 571 (Tex. App.—Texarkana 2020, pet. granted); *Lennox v. State*, 613 S.W.3d 597 (Tex. App.—Texarkana 2020, pet. granted). From the opinions and judgments in the court of appeals, the State filed its petition for review in the *Green* case on or about December 14, 2020. The State filed its petition for review in the *Lennox* case on or about December 18, 2020.

On February 24, 2021, this Court granted the State's petition for review. *See State v. Lennox*, No. PD-1213-20, 2021 Tex. Crim. App. LEXIS 181 (Tex. Crim. App. Feb. 24, 2021) (not designated for publication). Later, the State moved for an extension of time to file its brief on the merits, which this Court granted until April 12, 2021.

The State will be filing its brief on the merits on the April 12th deadline.

SUMMARY OF THE ARGUMENT

In summary, the judgment of the court of appeals should be reversed, and the trial court's judgment should be reinstated, because this Court, upon *de novo* review of a question of law, should construe the 2017 amendments to Section 32.21 to mean that the writing was, and continues to be, the "essential" element of the offense, and that the "value ladder" in subsection (e-1) was a punishment issue.

Under the plain meaning of the statutory scheme, the writing was, and continues to be, the "essential" element of the forgery offense because the legislature made no change to either subsection (b) or to the definition of "writing" under subsection (a)(2). In the alternative, the 2017 addition of subsection (e-1) and the words or phrase "Subject to Subsection (e-1)" to subsections (d) and (e) were ambiguous because they potentially raised three (3) options for future forgery cases: (1) subsection (e-1) was a jurisdictional element to be pled/alleged in the charging instrument and proved by the State in the appropriate courts; (2) subsection (e-1) raised a fact issue that might arise during the guilt-innocence phase, which sets the degree/classification of offense; or (3) subsection (e-1) was a punishment issue.

Of these options, various factors suggested that the legislature intended subsection (e-1) to be a punishment issue under *Oliva v. State*, 548 S.W.3d 518, 522-534 (Tex. Crim. App. 2018) and prior case law. This Court should hold accordingly, reverse the judgment of the court of appeals, and reinstate the trial court's judgment.

ARGUMENT AND AUTHORITIES

SOLE GROUND PRESENTED: FROM THE APPELLATE COURT'S STATUTORY CONSTRUCTION OF SECTION 32.21(e-1) OF THE TEXAS PENAL CODE, THERE WAS NO JURY CHARGE ERROR; BUT IN RESOLVING THE JURISDICTIONAL CONFLICT HEREIN, THE STATE OF TEXAS CORRECTLY CHARGES THE FELONY OFFENSE OF FORGERY UNDER SECTION 32.21 OF THE PENAL CODE, WHEN THE INDICTMENT ALLEGES THAT ANY DEFENDANT FORGES A WRITING WITH THE INTENT TO HARM OR DEFRAUD ANOTHER; THE WRITING IS THE ESSENTIAL ELEMENT OF THE OFFENSE, AND THE VALUE LADDER IN SUBSECTION (E-1), AS AMENDED IN 2017, WAS NOT AN ELEMENT OF THE OFFENSE, BUT A PUNISHMENT ISSUE.

A. **Introduction.**

In 2017, the legislature amended section 32.21 of the Texas Penal Code to add subsection (e-1), which applied only to offenses committed on or after its effective date, September 1, 2017. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 977, § 25, 2017 Tex. Gen. Laws 3966, 3977 (current version at TEX. PENAL CODE ANN. § 32.21). As pertinent to the present case and in *Green*, the amended subsections, as evidenced by the underlining below, provided the following:

> (b) A person commits an offense if he forges a writing with intent to defraud or harm another.
>
> * * *
>
> (d) Subject to Subsection (e-1), an offense under this section is a state jail felony if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check, authorization to debit an account at a financial institution, or similar sight order for payment of money, contract, release, or other commercial instrument.

(e) Subject to Subsection (e-1), an offense under this section is a felony of the third degree if the writing is or purports to be:

(1) part of an issue of money, securities, postage or revenue stamps;

(2) a government record listed in Section 37.01(2)(C); or

(3) other instruments issued by a state or national government or by a subsection of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against another person.

(e-1) If it is shown on the trial of an offense under this section that the actor engaged in the conduct to obtain or attempt to obtain a property or service, an offense under this section is:

(1) a Class C misdemeanor if the value of the property or service is less than $100;

(2) a Class B misdemeanor if the value of the property or service is $100 or more but less than $750;

(3) a Class A misdemeanor if the value of the property or service is $750 or more but less than $2,500;

(4) a state jail felony if the value of the property or service is $2,500 or more but less than $30,000;

(5) a felony of the third degree if the value of the property or service is $30,000 or more but less than $150,000;

(6) a felony of the second degree if the value of the property or service is $150,000 or more but less than $300,000; and

(7) a felony of the first degree if the value of the property or service is $300,000 or more.

See TEX. PENAL CODE ANN. § 32.21(d)(e)(e-1) (West Supp. 2020).

In *Lennox*, the court of appeals in its majority opinion concluded that the "value ladder" in subsection (e-1) controlled over subsection (d), when subsection (e-1) applied; and that the defendant's purpose in forging the writing in question was the element that determined the applicable offense classification under Section 32.21. *See Lennox*, 613 S.W.3d at 604. However, subject-matter jurisdiction for a felony offense vested only upon the filing of a valid indictment in an appropriate court; and if subsection (e-1) controlled over subsections (d) and (e), then previously-indicted felony-offenses for forgery would be relegated to courts with misdemeanor jurisdiction, or to justice courts with Class C jurisdiction.

To resolve this jurisdictional conflict for all future cases under section 32.21 of the Texas Penal Code, this Court should hold that the State correctly charges the felony offense of forgery—when the indictment alleges that any defendant, including Lennox, "forges a writing with the intent to harm or defraud another." *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020). Under subsection (b), the writing was, and continues to be, the "essential" element for the purpose of charging a forgery offense as a felony under Texas law. The "value ladder" in subsection (e-1) of the 2017 legislative amendments to section 32.21 was not an element of the offense, but a punishment issue. *See Oliva v. State*, 548 S.W.3d 518, 534 (Tex. Crim. App. 2018). Based on the argument and authorities below, the court of appeals

erred in (a) finding jury charge error and (b) reforming a felony-forgery conviction to a misdemeanor conviction, when the forgery offense was based on a valid indictment that was filed in the appropriate district court with felony jurisdiction in Lamar County.

B. Standard of Review: Statutory Construction as a Question of Law and *De Novo* Review.

In *Ramos v. State*, 303 S.W.3d 302 (Tex. Crim. App. 2009), an appeal specifically involving section 32.21, this Court held that "[s]tatutory construction is a question of law, and our review is *de novo*." *See id* at 306 (citing *Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008)). When construing a statutory provision, the constitutional obligation is to attempt to discern the fair, objective meaning of that provision at the time of its enactment. *See Ramos*, 303 S.W.3d at 306 (citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)). "When attempting to discern that fair, objective meaning, we may consult standard dictionaries." *See Ramos*, 303 S.W.3d at 306 (citing *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004)).

1. Plain Meaning Rule.

In *Ramos*, this Court construed section 32.21(e) of the Texas Penal Code, which had been amended by the legislature, to determine whether the felony forgery statute covered the forgery of a Social Security card. *See Ramos*, 303 S.W.3d at 303-04. In *Ramos*, this Court stated the following:

> When we construe a statute that, like § 32.21(e), has been amended, we must construe it as if it had been originally enacted in its amended form. *United States v. Franca*, 282 U.S. 568, 576, 51 S. Ct. 278, 75 L. Ed. 551 (1931); *Blair v. Chicago*, 201 U.S. 400, 475, 26 S. Ct. 427, 50 L. Ed. 801 (1906); *Schlichting v. Texas Bd. of Med. Exam.*, 158 Tex. 279, 310 S.W.2d 557, 563 (Tex.1958); N. Singer & J. Singer, Statutes and Statutory Construction § 22:35 (7th ed. 2009); 82 C.J.S. Statutes § 373 (1999). We must take the amended statute as it reads today, mindful that the Legislature, by amending the statute, may have altered or clarified the meaning of earlier provisions. 82 C.J.S. Statutes § 373 (1999).
>
> If we conclude that the meaning of the statutory provision in question is plain, then we give effect to that plain meaning, as long as it does not lead to an absurd result. *Boykin v. State*, 818 S.W.2d at 785. Finally, statutory terms not legislatively defined are generally construed as common usage allows, but terms that have an acquired technical meaning are generally construed in their technical sense. *Medford v. State*, 13 S.W.3d 769, 771-772 (Tex. Crim. App. 2000).

See Ramos, 303 S.W.3d at 306-07.

2. **Exception to the Plain Meaning Rule.**

In *Boykin*, this Court reasoned that "[t]here is, of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, we should not apply the language literally." *See Boykin*, 818 S.W.2d at 785 (citing *Faulk v. State*, 608 S.W.2d 625, 630 (Tex. Cr. App. 1980)). "When used in the proper manner, this narrow exception to the plain meaning rule does not intrude on the lawmaking powers of the legislative branch, but rather demonstrates

respect for that branch, which we assume would not act in an absurd way." *See Boykin*, 818 S.W.2d at 785.

"If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extratextual factors as executive or administrative interpretations of the statute or legislative history." *See id* at 785-86.

C. **Application of Law: The Plain Meaning Rule and the Exception to the Rule Under Statutory Construction and *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018).**

1. **In Applying the Plain-Meaning Rule, the 2017 Legislature Amended Subsections (d) and (e), and Added Subsection (e-1), But Made No Changes to Subsection (b) or (a)(2).**

In 2017, the legislature amended section 32.21 of the Texas Penal Code to add subsection (e-1), and amended subsections (d) and (e) to include the words, "Subject to Subsection (e-1)." *See* TEX. PENAL CODE ANN. § 32.21(d)(e)(e-1) (West Supp. 2020) (underlining added for emphasis). In *Lennox*, the majority opinion concluded that subsection (e-1) controlled over subsection (d), when subsection (e-1) applied; and that the defendant's purpose in forging the writing in question was the element that determined the applicable offense classification under Section 32.21. *See Lennox*, 613 S.W.3d at 604. However, the court of appeals reached that conclusion

in its majority and concurring opinions without any application of the rules of statutory construction, including the plain-meaning rule.[4]

In construing the meaning of, and interplay between, the statutes in *Oliva*, this Court held that "we give effect to the plain meaning of the text, unless the text is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended." *See Oliva*, 548 S.W.3d at 521. In construing the meaning of, and interplay between, the subsections of 32.21 at issue here, this Court should equally give effect to the plain meaning of the text. *See id*.

At issue here, the 2017 legislative amendments made no change to subsection (b) and, significantly, the amendments did not include the words, "Subject to Subsection (e-1)" in subsection (b). *Compare* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020) *with* TEX. PENAL CODE ANN. § 32.21(d) and TEX. PENAL CODE ANN. § 32.21(e) (West Supp. 2020). Also, the legislature in 2017 did not amend section 32.21 to change the definition of "writing" under subsection (a)(2). *See* TEX. PENAL CODE ANN. § 32.21(a)(2) (West Supp. 2020). Of total significance, there was a presumption of statutory consistency under the normal rules of statutory construction. *See Oliva*, 548 S.W.3d at 539, n. 25 (citing *Ex parte Keller*, 173

[4] On March 9, 2020, the State filed its motion for rehearing and urged that the opinion in *Lennox* did not apply rules of statutory construction; rather, the opinion erroneously concluded without citation to any authority that section 32.21(e-1) "controls at the expense of subsection (d)." *See* State's Motion for Rehearing, pg. 3. In its motion for rehearing, the State also argued that "the opinion in *Lennox* did not cite any legislative history or other authority to support such a conclusion." *See id*.

S.W.3d 492, 498 (Tex. Crim. App. 2005) ("That is, a word or phrase that is used within a single statute generally bears the same meaning throughout that statute[.]").

Because no legislative changes were made to subsection (b) and (a)(2), and this Court must construe the statute as if it had been originally enacted in its amended form. *See Ramos*, 303 S.W.3d at 306. Even in the amended form after the 2017 amendments, the writing was, and continues to be, the "essential" element of the forgery offense under subsection (b).

a. **Presumption of Statutory Consistency.**

The writing was, and continues to be, the "essential" element because, first of all, there was a presumption of statutory consistency under the normal rules of statutory construction. *See Oliva*, 548 S.W.3d at 539, n. 25 (citing *Ex parte Keller*, 173 S.W.3d at 498). In addition to this Court's historical precedents that involved writings, as explained below, the use of "writing," as a statutory term, has been consistent and unchanged since the enactment of Section 32.21 in 1970.

b. **Under the Plain Meaning Rule, the Forgery of a "Writing," As An Element of the Offense, Would Not Lead to Absurd Results.**

Secondly, the writing was, and continues to be, the "essential" element under subsection (b) because "[s]uch a [plain] reading would not appear to lead to an absurd result." *See Ramos*, 303 S.W.3d at 307. Therefore, the State's pleading of the defendant's act of forging a writing was, and should remain, a felony offense under subsection (b)—given the presumption of statutory consistency under the

normal rules of statutory construction in *Oliva* and under the plain-meaning rule in *Ramos*. *See Oliva*, 548 S.W.3d at 539, n. 25 (citing *Ex parte Keller*, 173 S.W.3d at 498); *Ramos*, 303 S.W.3d at 307.

For either of the two reasons above, the State correctly charged Lennox with a state-jail felony offense of forgery of a writing under section 32.21 of the Texas Penal Code, as amended but unchanged in subsection (b). *See* CR, pgs. 6-8. Here, the State's pleading alleged the defendant's act of forging a writing or writings—the financial instruments or checks numbered 1092, 1097 and 1099—in a three-count indictment that went unchallenged in the trial court, and a jury found Lennox guilty of the felony offenses of forgery, as charged in that three-count indictment. *See* CR, pgs. 66-68; RR, Vol. 3, pgs. 146-147. Because the State correctly charged a person (Lennox) with the act of forging a writing (i.e. financial instruments/checks) with the intent to harm or defraud another in a three-count indictment, the court of appeals erred in finding jury-charge error, including egregious harm, and in its "reformation of the judgment to reflect that he was convicted of three class B misdemeanor offenses . . ." *See Lennox*, 613 S.W.3d at 600, 606-07.

Because the court of appeals erred in its reformation of the trial court's judgment, this Court should reverse the judgment of the court of appeals and reinstate the trial court's final judgment(s) of conviction for the state-jail felony

offense of forgery of a financial instrument(s). *See* CR, pgs. 91-92 (count one); pgs. 94-95 (count two); pgs. 97-98 (count three). This Court should hold accordingly.

2. Exception to the Rule: The Plain Meaning Leads to Absurd Results or the 2017 Legislative Amendments to Section 32.21 of the Texas Penal Code Were Ambiguous.

In the alternative, this Court has recognized a legitimate exception to the plain meaning rule in *Boykin* (and its progeny), and in *Oliva*: "the text is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended." *See Oliva*, 548 S.W.3d at 521 (citing *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017)). Under either scenario here, this Court should apply the exception to the plain-meaning rule because, first, the opinions in *Lennox* (and in *Green*)—if not corrected—would lead, or have led, to absurd results that the legislature could not have possibly intended because the opinions changed fifty (50) years of forgery jurisprudence in Texas, by relegating once-validly indicted forgery offenses from felonies to misdemeanors. That was not what the legislature intended by the 2017 amendments.

Potentially absurd, the addition of subsection (e-1) would increase the offense classification of felonies beyond that of state-jail and third-degree offenses for the first time since 1970. *See* TEX. PENAL CODE ANN. § 32.21(e-1)(6)(7) (West Supp. 2020). Secondly, as in *Oliva*, there were two (2) possible constructions of the state forgery statute, after the 2017 legislative amendments: (1) the existence of

subsection (e-1) was a "purpose" element of the offense, as the court of appeals reasoned; or (2) the existence of subsection (e-1) was a punishment issue.

Under either scenario, as explained above, the 2017 legislative amendments to section 32.21, including the addition of subsection (e-1), were not plain but rather ambiguous because the state forgery statute might "be understood by reasonably well-informed persons in two or more different senses." *See Oliva*, 548 S.W.3d at 521; *State v. Schunior*, 506 S.W.3d 29, 34-35 (Tex. Crim. App. 2016); *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). In *Oliva*, this Court explained that "[i]f the statutory text is ambiguous or the plain meaning leads to absurd results, then we can consult extratextual factors, including (1) the object sought to be obtained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision. *See Oliva*, 548 S.W.3d at 521-22; *Baumgart*, 512 S.W.3d at 339 (citing TEX. GOV'T CODE § 311.023). Although relevant as an extratextual factor, this Court also explained that "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." *See Oliva*, 548 S.W.3d at 522 (citing TEX. GOV'T CODE § 311.024). Finally, this Court explained that any prior case law is taken into account in construing the statutes. *Id*.

a. **Explicit Labeling Under *Oliva*, 548 S.W.3d at 522.**

In *Oliva*, this Court explained that "[o]n a few occasions, the legislature has explicitly provided that an issue that increases the penalty for a crime be tried at the punishment stage." *See id* (reference to footnote omitted). According to this Court in *Oliva*, "such language does not appear to be the norm for statutes prescribing punishment issues in noncapital cases." *See id*. In *Oliva*, this Court mentioned that "the legislature does not ordinarily specify whether a matter should be litigated at the guilt or punishment stage of trial, and did not do so in the present statute," and "we must look to other language to determine the legislature's intent." *See id*.

In applying the *Oliva* rationale here, the amendments to the state forgery statute did not explicitly say that the "value ladder" in subsection (e-1) should be litigated at the guilt stage or at punishment. *See Oliva*, 548 S.W.3d at 522. Rather, subsection (e-1) merely stated, "If it is shown on the trial of an offense under this section . . .[,]" *see* TEX. PENAL CODE ANN. § 32.21(e-1) (West Supp. 2020); and subsection (e-1) made no reference to punishment. *See id*.

Thus, without more, subsection (e-1) was ambiguous because it might be understood by reasonably well informed person in two or more different senses. *See Oliva*, 548 S.W.3d at 521. Potentially, subsection (e-1) raised three (3) options for future forgery cases: (1) subsection (e-1) was a jurisdictional element to be pled/alleged in the charging instrument and proved by the State; (2) subsection (e-

1) raised a fact issue that might arise during the guilt-innocence phase, which sets the degree of offense; or (3) subsection (e-1) was a punishment issue.

Also, the language, "[i]f it is shown on the trial of an offense," suggested that the defendant might raise the "value ladder" as an issue of either a lesser-included offense or an issue of mitigation that might relate to punishment. As in *Oliva*, this Court should look to other language to determine the legislature's intent. *See Oliva*, 548 S.W.3d at 522.

b. **"A Person Commits an Offense if . . ."**

In *Oliva*, this Court recognized from *Wilson v. State* that the Penal Code's most obvious and common method of prescribing elements of an offense: prefacing incriminatory facts with the language, "A person commits an offense if . . ." *See Oliva*, 548 S.W.3d at 523, n. 24 (citing *Wilson*, 772 S.W.2d 118, 121-22 (Tex. Crim. App. 1989); *Ex parte Benson*, 459 S.W.3d 67, 85 (Tex. Crim. App. 2015) (discussing *Wilson*)). "[T]he legislature has created both basic and aggravated offenses in this manner." *See Oliva*, 548 S.W.3d at 523 (reference to footnote omitted).

As set forth above, the 2017 legislative amendments made no change to subsection (b) and, significantly, the amendments did not include the words, "Subject to Subsection (e-1)" in subsection (b). *Compare* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020) *with* TEX. PENAL CODE ANN. § 32.21(d) and TEX. PENAL CODE ANN. § 32.21(e) (West Supp. 2020). Also, the legislature in 2017 did not

amend section 32.21 to change the definition of "writing" under subsection 32.21(a)(2). *See* TEX. PENAL CODE ANN. § 32.21(a)(2) (West Supp. 2020).

Because the legislature made no change to subsection (b) and the definition of writing remain unchanged in subsection (a)(2), the prefacing language continued to state that "[a] person commits an offense if he forges a writing with intent to defraud or harm another." *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020). Again, as unchanged by the legislature, the "essential" element was, and continues to be, the specific writing—and not the "value ladder" in subsection (e-1)—because the prefacing language remained unchanged by the 2017 amendments. *See Wilson*, 772 S.W.2d at 121-22.

c. **"Subject to Subsection (e-1), . . ."** As set forth above, the 2017 amendments added the language, "Subject to Subsection (e-1)" to subsections (d) and (e), which classified felony offenses with certain specific writings. *See* TEX. PENAL CODE ANN. § 32.21(d)(e) (West Supp. 2020). In adding the language of "Subject to Subsection (e-1), the 2017 legislature did not define the phrase and words, "subject to." *See Green*, 613 S.W.3d at 577 ("This phrase is not defined in the Penal Code and has not been interpreted by Texas courts in a criminal case."). Further, section 311.005 of the Texas Government Code did not provide a definition of "subject to" in the general definitions. *See* TEX. GOV'T CODE ANN. § 311.005 (West 2013). Section 311.011(a) of the Texas Government Code provided in part

that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." *See* TEX. GOV'T CODE ANN. § 311.011(a) (West 2013); *see also Ramos*, 303 S.W.3d at 307 ("statutory terms not legislatively defined are generally construed as common usage allows"); *Medford*, 13 S.W.3d at 771 (same).

In *Green*, 613 S.W.3d at 582, the court of appeals determined that, when used in the ordinary sense, the terms "subject to" meant "subordinate to," "subservient to," or "limited by." *See id* (citing *In re Houston Cnty. ex rel. Session*, 515 S.W.3d 334, 341 (Tex. App.—Tyler 2015, orig. proceeding) (quoting *Cockrell v. Tex. Gulf Sulphur Co.*, 157 Tex. 10, 299 S.W.2d 672, 676 (Tex. 1956)). However, the court of appeals in *State ex rel. White v. Bradley*, 956 S.W.2d 725 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.3d 245 (Tex. 1999), adopted the interpretation that the phrase "subject to" meant "not in conflict with." *See id* at 738-39 (citing *City of Portland v. Jackson*, 316 Ore. 143, 850 P.2d 1093, 1094 (Or. 1993)).

Interestingly, the interpretation of "not in conflict with" seems inapposite to the definition of "subject to," which the court of appeals adopted in *Green*. *See Green*, 613 S.W.3d at 577 ("Those courts have held that a statutory provision is 'subject to' a different statutory provision is subordinate to that other provision."). None of the authorities cited by the court of appeals in *Green* involved the

interpretation of "subject to" in a criminal case, or within any statutory scheme in the Texas Penal Code.

Given the *Bradley* definition of "subject to" (to mean "not in conflict with"), *see Bradley*, 956 S.W.2d at 738-39, this Court should reject not only the definition by the court of appeals in *Green* but the conclusion that subsection (e-1) controlled over subsections (d) and (e). *See Lennox*, 613 S.W.3d at 604 ("As we have set out in detail in our opinion in *State v. Green*, our cause number 06-20-00010-CR, issued this date, subsection (e-1) controls over subsection (d) when subsection (e-1) applies."). If subsections (d) and (e) were "not in conflict with" subsection (e-1), then this Court should try to harmonize subsection (e-1) with subsections (d) and (e) because "[t]he different sections or provisions of the same statute or Code should be so construed as to harmonize and give effect to each, but, if there is an irreconcilable conflict, the later in position prevails." *See Ex parte Francis*, 72 Tex. Crim. 304, 326, 165 S.W. 147 (1914).

In *Green*, 613 S.W.3d at 592, the court of appeals reasoned that the fact that its construction limited the reach of subsections (d) and (e) did not render those subsections superfluous, and it did not render its interpretation invalid. *See id* (citing *Diruzzo v. State*, 581 S.W.3d 788, 800 (Tex. Crim. App. 2019)). However, that interpretation was not binding on this Court because, first, statutory construction is a question of law, and this Court's review should be *de novo*. *See Ramos*, 303

S.W.3d at 306. Secondly, that interpretation by the court of appeals in *Green* and in *Lennox* rendered subsections (d) and (e) meaningless because it prioritized (rather than harmonized) the "value ladder" over the importance that the legislature historically placed on certain writings in subsections (d) and (e).

d. **"If it is shown on the trial of . . ."**

Subsection (e-1) was prefaced by a phrase that is strongly associated with punishment enhancements: "If it is shown on the trial of." *See* TEX. PENAL CODE ANN. § 32.21(e-1) (West Supp. 2020). In *Oliva*, this Court recognized from *Wilson*, again, that this prefatory phrase was consistently restricted in the Penal Code "to matters dealing only with punishment." *See Oliva*, 548 S.W.3d at 527 (citing *Wilson*, 772 S.W.2d at 123). In *Oliva*, this Court reasoned that such a phrase ("if it shown on the trial of") did "seem inherently to indicate something that is in addition to an element of the offense." *See Oliva*, 548 S.W.3d at 527. Finally, this Court reasoned in *Oliva* that "[t]he fact that this phrase is absent from a number of statutes suggests that its presence in a particular statute intended to signify something." See id at 527-28.

In subsection (e-1), therefore, the presence of such a prefatory phrase was intended to be restricted "to matters dealing only with punishment." *See Oliva*, 548 S.W.3d at 527. As applied here, a defendant, like Lennox, could be charged and convicted of a state-jail felony offense of forgery of a financial instrument under

subsection (d); but depending on what the evidence proved at the time of trial, the defendant could then be punished in a range of punishment applicable to a Class A misdemeanor, a Class B misdemeanor, or a Class C misdemeanor. *See* TEX. PENAL CODE ANN. § 32.21(e-1)(1), (2) or (3) (West Supp. 2020); *accord* TEX. PENAL CODE ANN. § 12.44(a).

In only certain limited circumstances under subsection (e-1)(6) or (7), the State would be required to allege a writing under subsections (d) or (e) along with a value greater than $150,000 under subsection (e-1)(6), or a value greater than $300,000 under subsection (e-1)(7). In only those limited circumstances would the classification of a felony offense be associated with a second-degree or first-degree range of punishment.

Practically speaking, forgeries involving small amounts of money have been prosecuted under section 32.21 of the Penal Code. *See Paul Falcon v. The State of Texas*, No. 01-85-0581-CR, 1986 Tex. App. LEXIS 12653 (Tex. App.—Houston [1st Dist.] Apr. 17, 1986) (not designated for publication) (citing *Allen*, 544 S.W.2d at 405 for the proposition that forgeries involving small amounts of money—a $168 money order—may be prosecuted under section 32.21)).

e. **Extratextual Factors.**

As for the list of extratextual factors, *see Oliva*, 548 S.W.3d at 521-22, "the object sought to be obtained" was likely the legislature's intent to incorporate the

amendments from the theft statute in 2015. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 10, sec. 31.01, 2015 Tex. Gen. Laws 4209, 4213-14 (current version at Tex. Penal Code § 31.03(e)). Or, perhaps, the legislature intended for the forgery statute to not apply to the conduct of a first-time forger acting alone. *See*, *e.g.*, *Lang v. State*, 561 S.W.3d 174, 182-83 (Tex. Crim. App. 2018). Clearly, the "object sought to be obtained" could be addressed but for the absence of legislative history. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 977, § 25, 2017 Tex. Gen. Laws 3966, 3977 (current version at TEX. PENAL CODE ANN. § 32.21); *Green*, 613 S.W.3d at 577.

However, the court of appeals in *Lennox* did not mention any legislative history in either the majority opinion or the concurring opinion. In *Green*, legislative history was only listed in the opinion, *see Green*, 613 S.W.3d at 580 (citing TEX. GOV'T CODE § 311.023), but never analyzed.

As for the consequences of a particular construction, the court of appeals concluded that subsection (e-1) controlled over subsections (d) and (e), *see Lennox*, 613 S.W.3d at 604; but if that particular construction was correct, then previously-indicted felony offenses for forgery would be relegated to courts with misdemeanor jurisdiction, or to justice courts with Class C jurisdiction. *See supra*. Also, the court of appeals concluded that the defendant's purpose in forging the writing in question was the element that determined the applicable offense classification under Section

32.21, *see id*; but if that particular construction was equally correct, how would the State correctly allege the element of the defendant's purpose as a fact in its charging instrument, like in forgery-possession cases involving a social security card or a DL?

f. **Prior Case Law.**

Finally, in *Oliva*, this Court explained that any prior case law was to be taken into account in construing the statutes. *See Oliva*, 548 S.W.3d at 522. As relevant here, prior case law included *Ramos*, 303 S.W.3d at 306-07 (interpreting TEX. PENAL CODE ANN. § 32.21(e)) and *Shipp v. State*, 331 S.W.3d 433 (Tex. Crim. App. 2011) (plurality opinion) (interpreting TEX. PENAL CODE ANN. § 32.21(d)).

(1) **Subsection (d) of Section 32.21 of the Penal Code.**

In *Shipp*, this Court observed that, as enacted in 1973, the forgery statute was "materially identical to the version originally proposed in 1970." *See id*, 331 S.W.3d at 439 n. 35; *see also Ramos v. State*, 264 S.W.3d 743, 749 (Tex. App.—Houston [1st Dist.] 2008) (history of the forgery statute), *aff'd*, 303 S.W.3d 302 (Tex. Crim. App. 2009). In *Shipp*, the appellant was indicted for the offense of forgery, and a jury found that his passing of a counterfeit writing, a purported store receipt, constituted a "commercial instrument," and the jury convicted him of a state jail felony under Section 32.21(d). *See Shipp*, 331 S.W.3d at 433-34.

The court of appeals reversed and held that there was no evidence to show that a store receipt constituted a "commercial instrument" in contemplation of the

statute. *See Shipp*, 331 S.W.3d at 434. In *Shipp*, this Court granted review in order to address whether the court of appeals had correctly construed the statute. *See id* (citing TEX. R. APP. P. 66.3(d) for the proposition that one of this Court's considerations in deciding whether discretionary review is appropriate is that "a court of appeals . . . appears to have misconstrued a statute").

In *Shipp*, this Court (Judge Price, joined by three other judges) determined that it remained ambiguous whether the legislature intended for a store receipt to constitute an "other commercial instrument" in contemplation of section 32.21(d). *See Shipp*, 331 S.W.3d at 439. Given the ambiguity that was perceived in the statutory language, and in order to make sure the legislative purpose was not defeated, this Court consulted "extra-textual factors." *See id* (citing *Boykin*, 818 S.W.2d at 785-86).

In *Shipp*, this Court considered legislative history as one extra-textual factor. *See Shipp*, 331 S.W.3d at 439 ((citing TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . legislative history[.]")). In discussing subsection (d), as originally enacted in 1973, the Practice Commentary observed that "[t]he middle range of penalties [was] provided by Subsection (d) for documents of commerce and property transfer." *See Shipp*, 331 S.W.3d at 439 n. 35 (explaining that the Practice Commentaries derived from the Comments of the State Bar

Committee on Revision of the Penal Code that accompanied the 1970 Proposed Penal Code, and that the comments were "an important source of legislative history.").

In *Shipp*, this Court recognized that the list of "commercial instruments" in subsection (d) was the same now as when it was enacted in 1973, except that the phrase, "authorization to debit an account at a financial institution," had been added in 2003. *See id*. Finally, this Court mentioned that the "middle range of penalties" had been changed from a third-degree felony to a state-jail felony in 1994.

Ultimately, this Court concluded in *Shipp* that the particular "commercial instruments" delineated by subsection (d) were not so distinctly and narrowly drawn as to define a class to which a store receipt plainly did not belong. *See Shipp*, 331 S.W.3d at 440. A plurality of this Court held that a store receipt constituted another "commercial instrument" for purposes of subsection (d), and that the court of appeals erred to conclude otherwise. *See id*. Judge Meyers agreed with the plurality opinion that the receipt was a "commercial instrument," but relied only on the plain meaning of the statutory language. *See id* at 441-42 (Meyers, J., concurring).

(2) **Subsection (e) of Section 32.21 of the Penal Code.**

Prior to *Shipp*, this Court concluded in *Ramos* that, in common usage, the term "instrument" was broad enough to encompass a Social Security card. *See Ramos*, 303 S.W.3d at 307. Therefore, this Court concluded that the phrase "other

instruments issued by a state or national government or by a subsection of either," as used in Texas Penal Code § 32.21(e)(3), also encompassed a Social Security card. *See Ramos*, 303 S.W.3d at 307.

D. Conclusion: The Court of Appeals Erred in its Statutory Construction of the 2017 Amendments to Section 32.21 of the Penal Code.

1. The State Forgery Statute Criminalized the Act of Forging a Writing as a Felony Offense, and Conferred Jurisdiction to an Appropriate District Court with Felony Jurisdiction.

Put simply, the forgery statute, since its enactment, criminalized the act of forging a writing as a felony offense. *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020). Then, depending on the nature and/or the importance of the writing, the statutory scheme classified the specific writing—which the State would set forth factually in its indictment[5] on a case-by-case basis—as either a state-jail felony or a third-degree felony for the applicable offense classification. *See* TEX. PENAL CODE ANN. § 32.21(d), (e) (West Supp. 2020). From prior case law, *see Oliva*, 548 S.W.3d at 522, the store receipt in *Shipp* was the writing as a "commercial instrument" for purposes of subsection (d). *See Shipp*, 331 S.W.3d at 440. In *Ramos*, the Social Security card was the writing as an "instrument" for purposes of subsection (e)(3). *See Ramos*, 303 S.W.3d at 307.

[5] The State's indictment sets forth the writing in haec verba. *See Landry v. State*, 583 S.W.2d 620, 624 (Tex. Crim. App. 1979); *Allen*, 544 S.W.2d at 406. With the writing in haec verba and/or set forth in the tenor following, the State's indictment validly provided the defendant with sufficient notice of the actual writing and the degree of the felony-offense under subsections (d) or (e). *See Allen*, 544 S.W.2d at 406.

Historically, therefore, the State's factual allegations of the specific writing or writings in its indictments made the offense a felony on a case-by-case basis. *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020). In construing subsection (b) with subsections (d) and (e) upon *de novo* review, *see Ramos*, 303 S.W.3d at 306, this Court should hold that the writing is the "essential" element of the offense of forgery.

Here, under subsection (b), the State's indictment correctly charged Lennox with the felony offense of forgery because the indictment (CR, pgs. 6-7) factually alleged that the defendant "did then and there, with intent to defraud or harm another, pass to Nima Sherpa, a forged writing . . ." *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020). Then, the State's three-count indictment set forth the writing(s) in haec verba, *see Allen*, 544 S.W.2d at 406, and a photographic copy of each check appeared on the three-count indictment. *See Jones v. State*, 545 S.W.2d 771, 774 (Tex. Crim. App. 1975) (a photographic copy of a check appeared on the indictment); *see also Lennox*, 613 S.W.3d at 602 (check # 1092 in count 1); *Lennox*, 613 S.W.3d at 602-03 (check # 1099 in count 2) (check # 1097 in count 3). As factually alleged, the State's three-count indictment then provided Lennox with sufficient notice that the forged writing(s) was (or were) classified as a state-jail

felony under subsection (d) because the writing(s) was (or were) a financial instrument(s).[6] *See* TEX. PENAL CODE ANN. § 32.21(d) (West Supp. 2020).

As alleged as a state-jail felony offense, the State's indictment was presented to a grand jury in Lamar County, which returned a "true bill" on February 14, 2019. *See* CR, pg. 6. Once filed by the district clerk as cause number 28256 (CR, pg. 6), the presentment of the indictment vested jurisdiction in the Sixth Judicial District Court of Lamar County. *See* TEX. CONST. art. V, § 12 ("The presentment of an indictment or information to a court invests the court with jurisdiction of the cause."); *see also Teal v. State*, 230 S.W.3d 172, 174-75 n. 11 (Tex. Crim. App. 2007) (quoting *Cook v. State*, 902 S.W.2d 471, 475-76 (Tex. Crim. App. 1995) ("[j]urisdiction vests only upon the filing of a valid indictment in the appropriate court.")). "The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case." *See Teal*, 230 S.W.3d at 174.

Because the State's indictment, as validly presented here, correctly charged Lennox with the state-jail felony offense of forgery of a financial instrument under subsections (b) and (d), the three-count indictment charged an offense that fell within the district court's jurisdiction in Lamar County. *See id*. However, the court of

[6] In the majority opinion, the court of appeals observed that "[t]he indictment's caption recited that the offenses were state-jail felonies under subsection (d)[,]" but that indictment captions were not considered part of the charging instrument. *See Lennox*, 613 S.W.3d at 605, n. 7; CR, pg. 6.

appeals concluded that "the jury charge should have charged the offenses as class B misdemeanors." *See Lennox*, 613 S.W.3d at 604.

If the court of appeals was correct in concluding that the State should have charged the offenses as Class B misdemeanors, then the Sixth Judicial District Court in Lamar County never acquired jurisdiction over class B misdemeanors. *See McKinney v. State*, 207 S.W.3d 366, 376 (Tex. Crim. App. 2006) (Keller, P.J., concurring) (jurisdiction could not be conferred on the district court to try a Class B misdemeanor requested as a lesser offense by the defendant if the charged offense was only a Class A misdemeanor that was not itself within the district court's jurisdiction.). More importantly, if the court of appeals was correct in *Lennox*, then any forgery offense for a writing under $2,500 would jurisdictionally be classified as a misdemeanor offense and would be filed in a different court altogether. *See id*.

Such an absurd result in *Lennox*, especially after a jury trial, could not have been what the legislature intended by the 2017 amendments to Section 32.21 of the Penal Code—regardless of whether the amendments were ambiguous or not. *See Boykin*, 818 S.W.2d at 785 ("If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extratextual factors . . ."). Because of such an absurd result, the court of appeals erred in its statutory construction as a question

of law, and further erred in reforming the trial court's judgment(s) to reflect that Lennox was convicted of three class B misdemeanor offenses under Section 32.21(e-1)(2). *See Lennox*, 613 S.W.3d at 600, 607; *Lennox*, 613 S.W.3d at 613 (Burgess, J., concurring) ("I concur with the majority opinion reforming the trial court's judgment to reflect convictions of class B misdemeanor forgery offenses . . ."). Upon *de novo* review, this Court should reverse the judgment of the court of appeals and reinstate the trial court's judgment.

2. **The Legislature Intended for the 2017 Amendments to Section 32.21 to Prescribe a Punishment Issue.**

From prior case law, *see Oliva*, 548 S.W.3d at 522, this Court recognized in *Shipp* that the 1994 legislative amendments changed the "middle range of penalties" from a third-degree felony to a state-jail felony offense. *See Shipp*, 331 S.W.3d at 439 n. 35 (citing Acts 1993, 73rd Leg., ch. 900, § 1.1, p. 3644, eff. Sept. 1, 1994.). Significantly, those legislative amendments in 1994 related to "penalties," *see id*, which would have been a punishment issue. Again, historically, the statutory scheme in Section 32.21 still consistently criminalized the act or forging a writing as a felony offense because subsection (b) has never been changed or amended by any legislative amendments. *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2020); *Shipp*, 331 S.W.3d at 439 n. 35 (the forgery statute was "materially identical to the version originally proposed in 1970.").

Finally, from *Oliva*, this Court concluded that, although the statutory language was ambiguous, various factors suggested that the legislature intended that Section 49.09(a) prescribed a punishment issue. *See Oliva*, 548 S.W.3d at 534. Here, as in *Oliva*, the legislature intended that the addition of subsection (e-1) was a punishment issue, and not a jurisdictional "purpose" element of the offense, for the following reasons:

First, the 2017 amendments did not explicitly say whether the "value ladder" in subsection (e-1) should be litigated at the guilt stage or at punishment, and subsection (e-1) made no reference to punishment. *See Oliva*, 548 S.W.3d at 522. Second, the 2017 legislative amendments made no change to subsection (a)(2)—the definition of writing—or to subsection (b) and its prefacing language, "A person commits an offense if . . ." *See* TEX. PENAL CODE ANN. § 32.21(b) (West Supp. 2010). *See Wilson*, 772 S.W.2d at 121-22. For that reason, the writing was, and continues to be the "essential" element of the forgery offense. *See id*.

Third, the words ("Subject to") or the phrase, "Subject to Subsection (e-1)," were not defined by the 2017 legislative amendments, and the words or phrase was not defined in the applicable sections of the Texas Government Code. Further, the subservient-definition of "subject to," which the court of appeals adopted in *Green*, was inapposite to the definition in *Bradley*, 956 S.W.2d at 738-39 (citing *Jackson*, 850 P.2d at 1094). Fourth, the prefatory phrase, "if it is shown on the trial of," was

consistently restricted in the Penal Code to matters dealing only with punishment. *See Oliva*, 548 S.W.3d at 527; *Wilson*, 772 S.W.2d at 123.

Fifth, the absence of legislative history in the *Green* and *Lennox* opinions relegated "the object sought to be obtained" to speculation, along with several other extra-textual factors. As for the consequences of a particular construction, the legislature did not intend to relegate previously-filed felony offenses for forgery to courts with misdemeanor jurisdiction, or to justice courts for Class C misdemeanors.

Finally, from prior case law, this Court has previously construed subsections (d) and (e) to broaden the statutory scheme to include certain writings, like a receipt or a Social Security card, and to emphasize the importance of certain writings. Again, for that reason, the writing was the "essential" element of the forgery offense.

For the reasons above, this Court should conclude that the 2017 legislative amendments to section 32.21, including subsection (e-1), prescribed a punishment issue, not a "purpose-element." This Court should hold accordingly, reverse the judgment of the court of appeals, and reinstate the trial court's judgment(s) as to the three (3) counts.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that upon final submission of the above-styled and numbered causes with oral argument, this Court reverse the judgment of the court of appeals and reinstate the trial court's

final judgments of conviction as to the three (3) counts; adjudge court costs against the appellant; or, in the alternative, reverse the judgment of the court of appeals and remand for a new trial; and for such other and further relief, both at law and in equity, to which the State may be justly and legally entitled.

Respectfully submitted,

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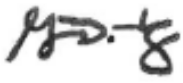
By: 
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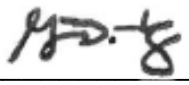

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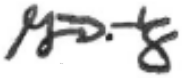

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